SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

v.

UNIVERSAL C.I.T. CREDIT CORPORATION.
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

HAROLD S. HUTCHISON
Vienna, Missouri 65562
314-422-3396
CLAUDE T. WOOD
Richland, Missouri 65556
314-765-4451
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your Petitioner, Weidinger Chevrolet, Inc., respectfully prays to this Honorable Court that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit to review a judgment of that Court on July 31, 1974, reversing an opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri,

rendered on June 27, 1973; and an Order of the United States Court of Appeals for the Eighth Circuit entered on August 21, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not reported. A copy of the opinion and judgment is attached to this Petition and may be found in Appendix A, infra. The opinion of the District Court for the Southern Division of the Western Judicial District of Missouri is attached to this petition and may be found in Appendix B. A copy of the Order denying Petitioner's Motion for rehearing is attached to this Petition and may be found in Appendix C. A copy of the Order Staying Issuance of Mandate for Thirty Days entered September 3, 1974, is attached to this Petition and may be found in Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the United States District Court for the Southern Division of the Western District of Missouri was entered July 31, 1974, and dated as of that date. The Order of the Court of Appeals denying the Petition for Rehearing en banc or for Rehearing was entered by the Court of Appeals on August 21, 1974. The order staying issuance of mandate for thirty days was entered September 3, 1974. The opinion of the United States Court of Appeals for the Eighth Circuit presents novel and serious constitutional questions under the due process clauses of the Fourteenth Amendment to the Constitution of the United States. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decisions of the Supreme Court of the United States. The Court of Appeals for the Eighth Cir-

cuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1). This Petition is presented under and pursuant to the Federal Rules of Civil and Appellate Procedure and Rule 19 of the Supreme Court of the United States of America.

This Petition is accompanied by a certified copy of the record of all of the proceedings in the Court of Appeals including the decision Petitioner seeks to have reviewed and including the Appendix (or record) filed in the Court of Appeals, and by a supporting brief.

QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the United States Court of Appeals for the Eighth Circuit present novel and serious constitutional questions under the due process clause of the Fourteenth Amendment?

2. Is the decision of the United States Court of Appeals for the Eighth Circuit probably not in accord with the applicable decision of the Supreme Court of the United States?

3. Has the Court of Appeals for the Eighth Circuit rendered a decision in conflict with the decision of another Court of Appeals on the same matter?

4. Has the Court of Appeals decided an important state question in a way in conflict with applicable state law?

5. Did Respondent have a lien on the 22 automobiles when they were seized by Writs of Attachment and Replevin?

6. Is Respondent estopped to assert a lien on the 22 automobiles owned by petitioner?

7. Did respondent waive its lien on the 22 automobiles owned by petitioner?

8. Was petitioner deprived of its property without due process of law and if so is petitioner entitled to recover the 22 automobiles or their value if return can not be had?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 100 Article 1 of the Constitution of Missouri for 1945, provides:

> "That no party shall be deprived of life, liberty or property without due process of law."

Section 521.050, RSMo. 1969 provides:

> "Any plaintiff wishing to sue by attachment may file in the clerk's office of the court in which the attachment is instituted, or with the magistrate before whom the suit is brought, a petition or other lawful statement or exhibit

of his cause of action, and, except in suits instituted by the state or a county in its own behalf, and also, except in cases where the defendant is not a resident of the state of Missouri, in either of which cases no bond shall be required, shall also file an affidavit and bond, and, thereupon, such plaintiff may sue out an original attachment, if in the circuit court, against the lands, tenements, goods, moneys, effects and credits of the defendant in whose hands soever the same may be; or if before a magistrate, against the goods, money, effects, and credits of the defendant, wheresoever found within the county; and where the affidavit for an attachment states that the plaintiff will lose his claim, unless the writ of attachment issues, and be served on Sunday or any other legal holiday, the writ may be issued and served on that day; provided, that when any writ of attachment has issued against a non-resident and the plaintiff has given no bond, the attachment shall be dissolved as of course, and the land, tenements, goods, moneys, effects and credits of the defendant taken or levied upon under such writ of attachment shall be released therefrom, upon the defendant entering his appearance and filing his answer to the merits of the case; unless the plaintiff shall, within ten days from the date of the filing and service of defendant's answer and entry of appearance, file his bond in said case in double the amount sworn to in the affidavit of the plaintiff; provided, however, upon good cause shown, the circuit judge may grant an additional ten days to file said bond; the bond herein provided for as to its effect and the obligation of the parties thereto shall be the same as if filed before the writ of attachment was issued."

Section 533.020 RSMo 1969, provides:

"Upon filing such affidavit, the court, or judge or clerk in vacation, shall make an order requiring the defendant

to deliver the property specified in the affidavit to the sheriff, and requiring the sheriff, if the same be not delivered to him, to take it from the defendant and deliver it to the plaintiff."

Section 400.236 RSMo 1969, provides in part:

"(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is * * *

(b) a 'sale or return' if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3) * * * goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum.' However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the article on secured transactions (article 9)."

Section 301.210 (1), RSMo. 1969, provides:

"In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a statement of all liens or encumbrances on said motor vehicle or trailer and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer."

Section 301.600 (1) and (2) RSMo, 1969, provides:

"Unless excepted by section 301.650, a lien or encumbrance on a motor vehicle or trailer, as defined by section 301.010, is not valid against subsequent transferees or lienholders of the motor vehicle or trailer who took without knowledge of the lien or encumbrance unless the lien or encumbrance is perfected as provided in section 301.600 to 301.670."

"A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery."

Section 301.650 RSMo, 1969, provides:

"1. Sections 301.600 to 301.670 do not apply to or affect:

(1) A lien given by statute or rule of law to a supplier of services or materials for the motor vehicle or trailer;

(2) A lien given by statute to the United States, this state or any political subdivision of this state;

(3) A lien or encumbrance on a motor vehicle or trailer created by a manufacturer or dealer who holds the motor vehicle or trailer for sale.

2. The method provided in sections 301.600 to 301.670 of perfecting and giving notice of liens or encumbrances subject to section 301.600 to 301.670 is exclusive."

STATEMENT OF THE CASE

In May, 1970, the petitioner filed in the District Court for the Southern Division of the Western District of Missouri, its First Amended Complaint seeking $34,145.00 with interest and costs for conversion of twenty-two (22) automobiles by respondent and seeking punitive damages in the amount of $100,000.00 (Tr pp. 4, 5). The respondent filed an Answer and Counter Claim (Tr pp. 6, 7). Petitioner filed a Reply (Tr pp. 8, 9). Judgment was for petitioner for $41,490.00 (Tr p. 32). Notice of Appeal was filed by respondent on September 6, 1973 (Tr p. 33).

It was admitted that when respondent entered into a new car floor plan agreement with Jimmy Swanson, the respondent knew Swanson had entered into a used car floor plan agreement with GMCO and respondent did not intend to floor plan used cars with Jimmy Swanson (Tr p. 13) and further admitted that respondent consented to the sale of used motor vehicles owned by Swanson in the normal course of business. (Tr p. 14). It was further admitted that respondent deprived petitioner of possession of the twenty-two (22) motor vehicles under Writs of

Replevin and Writs of Attachment and Summons to Garnishee against the property and effects of Jimmy Swanson and petitioner was not made a party to the replevin action or the attachment action. (Tr p. 15). The trial Court found that in September, 1964, GMCO entered into a floor plan agreement with Swanson, a second hand car dealer and "floor planned" his stock of used cars from then until the situation arose which caused this suit. (Tr p. 27). The trial Court found that at the time Swanson entered into the agreement with the respondent, respondent had full knowledge that Swanson was financing used cars with GMCO; that respondent refused to furnish financing of Swanson's used car inventory; and that there was no question that after this refusal respondent had full knowledge that Swanson was floor planning his second hand cars with GMCO and the respondent made no objection to this continuing arrangement between GMCO and Swanson. The trial Court also found that the evidence showed that it is not unusual for one second hand car dealer to have a car for sale on another dealer's lot, and to pay a commission to the other dealer if he sold the car. (Tr p. 28).

The trial Court also found that all twenty-two (22) cars in question had been floor planned for Swanson by GMCO; and that there was absolutely no evidence to support the contention that the sale of cars by Swanson to petitioner was fraudulent. The trial Court specifically found that these transactions were legitimate, arms length dealing between the parties involved. (Tr p. 29).

The trial Court also found that for over a year and a half after the financing agreement with Swanson, the respondent knew that he was actively engaged in the second had car business, since he had three used car lots; that respondent never asked Swanson to account for any of the proceeds of the sale of a single used car during that entire period of time, nor did respondent investigate whether Swanson was selling the cars in

the "ordinary course of business" at retail, to individuals, or in wholesale lots to other dealers; that respondent knew that Swanson was borrowing money on all his second hand car inventory from GMCO; and that respondent made inquiries as to whether Swanson was paying promptly. The trial Court said it would be inclined to find that by this course of dealing, the respondent had waived its lien entirely by treating Swanson's used car business as completely separate from the new car business which respondent was financing. The trial Court said it could certainly be argued that by this course of conduct the respondent would be estopped from asserting a lien against a party in the shoes of the petitioner who knew of the conduct of the respondent. (Tr p. 30).

GMCO floor planned all of the twenty-two (22) automobiles involved in this suit for Swanson Chrysler Plymouth. (Tr p. 38). GMCO had floor planned twenty-three (23) automobiles with Swanson which petitioner assumed (one of which is not involved in law suit). (Tr p. 41). Petitioner was the holder of the titles of all the twenty-two (22) automobiles which are involved in this law suit, when the automobiles were seized by the respondent. (Tr p. 65). Used car dealers frequently have other automobiles on their lot for sale. (Tr p. 67). The district manager for respondent told Swanson that respondent definitely didn't finance floor planned used cars. (Tr p. 83). Swanson informed the district manager that he had been floor planning used cars with GMCO and that was when the district manager of the respondent told Swanson that respondent did not finance used cars and when Swanson told respondent that he intended to continue floor planning with GMCO. (Tr p. 34).

Agents of the respondent checked Swanson's new car inventory. They did not check on the used cars he had on the lot and they had no interest in the used cars and Swanson did not know of respondent's agents at any time checking on the used cars he had financed with GMCO and no agent of the respondent

ever asked Swanson if he had anybody else's used cars on the lot. (Tr p. 89).

Witness Carmichael was then district manager for respondent and negotiated the wholesale financing agreement with Swanson and understood the agreement with respondent was to floor plan new cars. (Tr p. 105). Respondent was not to finance used cars and respondent did not floor plan Swanson's used cars and at the time William Carmichael was working with Swanson he was aware that GMCO was floor planning Swanson's used cars. Carmichael told Swanson that respondent would not floor plan his used cars specifically since he was already floor planning used cars with GMCO. (Tr p. 85). Respondent allowed Swanson to continue the floor planning of used cars with GMCO when respondent obtained a personal guarantee from Swanson's father and after obtaining the personal guarantee, respondent allowed Swanson to go ahead with GMCO. From Carmichael's reports to respondent, respondent was aware that the St. Louis district office of respondent knew that respondent was not floor planning used cars and that GMCO was continuing to floor plan used automobiles. (Tr p. 107). It was stipulated that the twenty-two automobiles described in the complaint were seized under a writ of attachment or a writ of replevin issued against Swanson in which actions the petitioner was not a party. (Tr pp. 113, 114).

When a representative of the respondent would call at Swanson's to check, they did not check his used cars. (Tr p. 121).

The trial Court correctly stated to respondent's witness, Loretta Slavick, an accountant, that:

> "Everybody knew, you knew, C. I. T. knew, everybody knew that GMCO was floor planning the used car inventory and there was nothing on the financial statement to show what was owed." (Tr p. 133).

Respondent's witness Perry Clark said he never asked GMCO if they had floor planned any of the cars respondent was seizing. (Tr p. 152). Before respondent seized the automobiles at Rolla, respondent was informed that the automobiles belonged to petitioner and notwithstanding that information respondent proceeded to seize the automobiles and made no inquiry of the petitioner about the automobiles. (Tr. p. 153).

A witness for respondent said respondent was interested in Swanson's equity in the used cars but did not inquire of GMCO how much lien they had on the floor plan. (Tr. p. 155).

The District Court awarded petitioner $41,490.00 and taxed the cost to respondent. (Tr p. 3). The Court found that Swanson was a used car dealer in general; that they usually have other automobiles on the lot; and that Mr. Swanson, at any given time has cars on the lot for sale. (Tr pp. 67, 68).

The Court of Appeals reversed the judgment of the District Court, holding that the sales by Swanson to petitioner were in the ordinary course of business and that petitioner acquired the twenty-two (22) automobiles free of security interest of respondent. (Tr pp. 7, 8, Vol. II). The Court of Appeals reversed the judgment of the District Court holding that the twenty-two (22) cars, although owned by petitioner, were in possession of respondent and deemed to be "sale or return" and hence reinstated the lien of the wholesale financing agreement and respondent's security interest reattached to such cars and were subject to the lien rights of respondent. (Tr pp. 10, 11, Vol. II).

REASONS FOR GRANTING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit presents novel and serious constitutional questions under the due process clauses of the Fourteenth Amendment of the Constitution of the United States.

II. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decision of the Supreme Court of the United States.

III. The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

IV. The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

ARGUMENT

I

The Opinion of the United States Court of Appeals for the Eighth Circuit Presents Novel and Serious Constitutional Questions Under the Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeals says that by following the Missouri Replevin Statute Respondent was able to obtain possession of the twenty-two (22) automobiles without pre-seizure hearing. While apparently conceding that the seizure of the twenty-two (22) automobiles by Respondent was a violation of due process, the Court of Appeals refuses to pass upon the constitutionality of Missouri Replevin Statute and holds that the means of acquisition does not impair the validity of security interest. Ob-

viously this would nullify, for all practical purposes, the decision of this Court in *Fuentes v. Shevin*, 407 US 67 (1972).

We earnestly urge that it is in the public interest that this Court should, in unmistakable terms, declare whether the consolidated cases of *Fuentes v. Shevin*, 407 US 67, and *Parham v. American Continental et al.*, 407 U.S. 67, 92 S. Crt. 1973, 32 L Ed (2) 556, has been completely overruled by the recent opinion of this Court in *Lawrence Mitchell v. W. T. Grant*, decided May 13, 1974, — U.S. —, 92 L Ed (d) 406, 94 S. Crt. 1895. In *Fuentes*, supra, this Court held that the Replevin Statutes of the State of Florida and of the State of Pennsylvania, which are identical with Missouri Replevin Statutes, are invalid under the Fourteenth Amendment of the Constitution of the United States, since this works a deprivation of property without due process of law by depriving the right to prior opportunity to be heard before chattels are taken from the possessor.

In *McClellan v. Commercial Credit*, 350 F. Supp. 1013 (D. R.I. 1972), affirmed sub nom., *Georges v. McClellan*, 409 U.S. 1120 (1973), 93 S. Crt. 935, 41 L Wk. 3278, 35 L Ed (2) 253, this Court affirmed a decision of a three Judge Federal Court for the District of Rhode Island, holding that prejudgment attachment procedure pursuant to Rhode Island General Laws is unconstitutional and enjoined the attachment at issue of the two-named plaintiffs.

In *Mitchell v. Grant*, supra, Mr. Justice White, speaking for this Court, says:

> "But we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case." 94 S. Crt. 1904.

Mr. Justice Powell, in *Mitchell v. Grant*, supra, concurring in the majority opinion, says that he could have agreed that the Florida and Pennsylvania statutes in replevin were violative of due process because of the arbitrary and unreasonable provision and that he thinks the *Fuentes* opinion was too broad and inflexible. He says that narrower grounds existed for invalidating the replevin statutes in that case. 94 S. Crt. LC 1908.

In passing, we submit that the Missouri Replevin and Attachment Statutes set forth supra in our Constitutional and Statutory Provisions are in all respects similar to statutes of Pennsylvania, Florida and Rhode Island and should present at least narrower grounds for invalidating replevin and attachment statutes in Missouri.

The dissenting opinion in *Mitchell v. Grant*, supra, expresses the opinion that *Fuentes* is overruled by *Mitchell v. Grant*.

We earnestly urge that the position of this Court as to the rule announced in *Fuentes v. Shevin*, supra, should be clarified. Mr. Justice Stewart points out in his dissenting opinion,

> "In the short time that has elapsed from the time the case was decided, many state and federal courts have followed it in assessing the validity of state replevin statutes and other comparable state laws."

It was definitely followed by the Missouri Supreme Court in *State ex rel. Williams v. Berrey*, 492 S.W. 2d 731.

Assuming, for purposes of this argument, that *Fuentes v. Shevin* is completely overruled, Justice Powell says in his concurring opinion that narrower grounds existed for invalidating the replevin statutes in *Fuentes v. Shevin*, supra, then we submit that these narrower grounds still exist for invalidating the replevin statutes of Missouri. The holding of the Court of Appeals that if Respondent had acquired possession of the automobiles

through self-help, plaintiff could not have complained, is not supported by the previous opinions of the Court of Appeals relied upon for that proposition. In each of the previous decisions of the United States Court of Appeals for the Eighth Circuit, cited in foot note 13 of the opinion of the Court of Appeals, there had been no participation by a State officer. The only alleged state participation in all those cases was the fact that the legislatures of the states involved had enacted self-help statutes. In the case at bar, as admitted, the twenty-two (22) automobiles were seized by an officer under a writ of replevin and attachment and comes squarely within the purview of *Fuentes v. Shevin*, supra, if *Fuentes v. Shevin* is still the law of the land, or if it is overruled, then within the narrower grounds that existed in Fuentes v. Shevin, supra.

II

The Decision of the United States Court of Appeals for the Eighth Circuit Is Probably Not in Accord With the Applicable Decision of the Supreme Court of the United States.

In refusing to pass upon the constitutionality of the Missouri Replevin Statute, which is identical in its terms with the Replevin Statute involved in *Fuentes v. Shevin*, supra, and in *McClellan v. Commercial Credit Corporation*, 350 Fed. Supp. 1013 (D. R. I. 1972) affirmed sub nom, *Georges v. McClellan*, 409 U.S. 1120 (1973) the decision of the Court of Appeals is probably not in accord with the applicable decision of the Supreme Court.

We incorporate by reference what we have said under point I of this Argument. In *Fuentes v. Shevin*, supra, and in *McClellan v. Commercial Credit Corporation*, supra, the state statutes were declared unconstitutional. As said by Mr. Justice Powell, narrower grounds existed for invalidating the replevin statutes of Pennsylvania and Georgia, we submit that the same narrower grounds still exist for invalidating the Replevin and Attachment Statutes of Missouri.

III

The Court of Appeals for the Eighth Circuit Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

The Court of Appeals for the Eighth Circuit, in its opinion, holds, in effect, that the Uniform Commercial Code prevails over the Missouri Vehicle Statute, 301.210. The United States Court of Appeals for the Third Circuit *In Re Manufacturers Credit Corporation*, 441 Fed (2) 1313, decided April 12, 1971, holds to the contrary. In that case, the Third Circuit, at page 1317, of its opinion, sets forth the provisions of New Jersey's Uniform Commercial Code which provides for the filing of a security interest on a motor vehicle, and holds that its provisions, and not those of the New Jersey Uniform Commercial Code, govern the proper method of filing a lien on a motor vehicle. The Missouri section of the Uniform Commercial Code is identical with the New Jersey section, and Missouri Statutes providing for perfection of a lien on a motor vehicle are the same as in New Jersey. The Third Circuit held that the special motor vehicle statute governs on the perfection of liens on motor vehicles and not provisions of Commercial Code. That, we submit, is contrary to the ruling of the Court of Appeals in the case at bar, wherein they hold that by merely leaving the automobiles on the lots of Swanson, the wholesale financing agreement of Respondent attached to the twenty-two (22) automobiles.

Respondent's floor plan agreement with Swanson does not apply to new vehicles that are in fact sold by Swanson to someone else. The twenty-two (22) automobiles involved were sold by Swanson to Petitioner and certificates of title were delivered. There was no intention by Respondent in his wholesale financing agreement to have a lien on cars that are sold. Section 301.650 (3) RSMo, 1969, was put in primarily to allow dealers to get liens and have liens on new cars when no title had been

issued. The section was never meant to apply to any cars that Swanson sold. The Uniform Commercial Code's definition of sales does not apply to motor vehicles.

IV

The Court of Appeals Has Decided an Important State Question in a Way in Conflict With Applicable State Law.

Williams v. Berrey, 492 SW (2) 731, Supreme Court of Missouri, en banc, April 9, 1973, expressly holds that where chattels were seized by the constable without prior notice, without an opportunity to be heard, and without establishment of validity or probable validity of underlying claim therefor, the relator was deprived of possession of property in violation of due process clause of the Fourteenth Amendment to the Constitution of the United States of America and relator was entitled to be restored to possession of the chattels seized from relator. In the case at bar, it is admitted that the twenty-two (22) automobiles were seized under writs of replevin and attachment without prior notice to Petitioner and without opportunity to be heard. Nevertheless, the Court of Appeals for the Eighth Circuit has held to the contrary.

It is interesting to note that the Supreme Court of Missouri at page 735 of its opinion followed the rule announced by this Court in *Fuentes v. Shevin*, supra. In the case at bar, there is no dispute in the record but what the twenty-two (22) automobiles were seized by an officer under writs of replevin and writs of attachment issued against James Swanson and without any notice or opportunity to be heard before seizure.

We submit that the decision of the Court of Appeals in the case at bar is in direct conflict with the rule announced by the highest Court of the state of Missouri.

Certiorari may be granted to resolve a conflict between a Federal Court and the highest Court of a state. *Memorial Hospital v. Maracopa County*, 39 L Ed (d) 306, 312, 94 S. Crt. decided February 26, 1974.

In *O'Brien v. Skinner*, 38 L Ed (d) 702, 94 S. Crt. —, — U.S. — decided by this Court January 16, 1974, the Court said:

> "It is not our function to construe state statutes contrary to the construction given it by the highest Court of the State."

The opinion of the Court of Appeals for the Eighth Circuit is also in direct conflict with a decision of the Supreme Court of North Carolina in *Nationwide Mutual Insurance Company v. Hayes*, 174 SE 2d 511.

Respectfully submitted

HAROLD S. HUTCHISON
Vienna, Missouri 65582

CLAUDE T. WOOD
Richland, Missouri 65556

Attorneys for Petitioner

APPENDIX

APPENDIX A

Opinion

United States Court of Appeals
For the Eighth Circuit

No. 73-1681

Weidinger Chevrolet, Inc., Appellee,
v.
Universal C.I.T. Credit Corporation, Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: February 12, 1974

Filed: July 31, 1974

Before Mehaffy, Chief Judge, Gibson and Webster, Circuit Judges.

Webster, Circuit Judge.

This case presents for our review under the Uniform Commercial Code the scope and application of a security agreement granting a floor plan lender a broad security interest in the motor vehicle inventory of an automobile dealer with multiple locations and sources of financing.

Jim Swanson, not a party to this litigation, was a used car dealer in Belle, Missouri. Commencing in 1964, he financed the purchase of his used car inventory through a floor plan ar-

rangement with GMCO Agency, Inc. of Vienna, Missouri. Under the terms of the floor plan, Swanson delivered a note and title to each new car which he purchased, and GMCO issued him a check in the amount of the note. Ten per cent of the principal balance of the note was due in 90 days. Leonard Weidinger owned a one-third interest in GMCO and together with his wife owned all of the shares of Weidinger Chevrolet, Inc. Swanson had a side arrangement with Weidinger under which Swanson from time to time relieved his maturing obligations to GMCO by assigning used cars to Weidinger Chevrolet. Weidinger Chevrolet would then issue its note to GMCO in release of Swanson's note. Cars which Weidinger Chevrolet acquired in this manner were frequently left on Swanson's used car lot and were sold by him on a commission basis.

In 1968, Swanson acquired a Chrysler-Plymouth Agency at a different location. For the purpose of financing the new car agency, Swanson entered into an "Agreement for Wholesale Financing" with Universal C.I.T. Corporation (C.I.T.). C.I.T. knew that GMCO had a floor plan agreement with Swanson and did not intend to floor plan Swanson's used cars. On March 21, 1968, C.I.T. filed a financing statement executed by Swanson in favor of C.I.T. as the secured party and specifically disclosing a security interest which covered, *inter alia*:

> (i) The following types of inventory, both new and used: automobiles, buses, trucks, truck tractors; trailers and semi-trailers; mobile homes, farm tractors and other farm equipment; boats, boat motors and other marine products and equipment * * *; (ii) leases covering any of the foregoing; and (iii) accounts and contracts rights now or hereafter owing to the debtor.

In December, 1969, C.I.T. discovered that Swanson had sold a substantial number of new Chryslers and Plymouths "out of trust"—that is without having paid C.I.T. in accordance with the terms of the security agreement. C.I.T. promptly brought a

replevin action under Missouri law asserting an immediate right to possession under its "Agreement for Wholesale Financing." C.I.T. caused all of the cars thus seized to be sold, including 22 cars which had previously been assigned to Weidinger Chevrolet. Weidinger Chevrolet thereafter brought this suit to recover the value of the cars alleged to have been converted unlawfully by C.I.T. In a trial to the court without a jury, the District Judge[1] found in favor of Weidinger Chevrolet and awarded actual damages of $34,290 and prejudgment interest of $7,200. It is from this judgment that C.I.T. appeals.

In an unpublished opinion and judgment, the District Judge intimated that by its course of dealing C.I.T. had waived its lien on the automobiles "by treating Swanson's second hand car business as completely separate from the new car business which [C.I.T.] was financing." He based his decision, however, upon the following clause which appears in the Agreement for Wholesale Financing:

> You shall have all the rights of a secured party under the Uniform Commercial Code or at common law or in equity or under any other statute or under this agreement. Your rights and remedies hereunder shall be cumulative. It is agreed that new and used automobiles, trucks, . . . are the subject of widely distributed standard price quotations and are customarily sold on and in a recognized market. A private sale of any chattel to a dealer in such types of chattels for the amount we originally paid for such chattel or at any lesser fair price is a commercially reasonable disposition thereof.

The District Judge construed this clause as an authorization to Swanson to make a reasonable disposition at a private sale of any of the cars secured by the agreement, free of any of its

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[1] Honorable William Collinson, United States District Judge for the Eastern and Western Districts of Missouri.

provisions. Since C.I.T. agreed that the 22 cars involved were worth far less than Weidinger Chevrolet had paid for them, the earlier sales of the cars by Swanson to Weidinger Chevrolet must have been a "commercially reasonable dispostion," and Weidinger Chevrolet therefore acquired title free of C.I.T.'s security interest.

In this appeal, C.I.T. contends that it had a valid security interest in Swanson's used car inventory superior to Weidinger Chevrolet's claimed interest and that it did not waive, nor was it estopped from, asserting its interest. Further, C.I.T. contends that even if Weidinger Chevrolet acquired the cars in question from Swanson free of C.I.T.'s security interest, it resubjected the cars to the security interest by leaving the cars on Swanson's lot for resale.

Jurisdiction was based upon diversity of citizenship between C.I.T., a citizen of Delaware, and Weidinger Chevrolet, a citizen of Missouri. We apply the law of Missouri, which has adopted the Uniform Commercial Code.[2]

Acquisition of Security Interest

The first question presented is whether C.I.T. acquired a perfected security interest in the used cars which were subsequently replevied and sold. It is undisputed that GMCO made no attempt to file or otherwise perfect its own security interest, and we are therefore not confronted with a question of priority of liens.

No attack is mounted upon the sufficiency of the security agreement[3] and financing statement. Indeed the essential ele-

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[2] V.A.M.S. Chapter 400. References to sections under this Chapter correspond to article and section numbers of the Uniform Commercial Code.

[3] The Agreement for Wholesale Financing provides that in event of any breach of its terms by debtor, or of any act of bankruptcy, or

ments are fully set forth. The description of the inventory in the financing statement is more than adequate notice. Nor is it significant that the automobiles were located on a Swanson used car lot rather than at the agency. It is only required that the financing statement reflect the signatures of the parties, give the address of the secured party from which information concerning the security interest may be obtained, give a mailing address of the debtor and contain a statement indicating the types, or describing the items, of collateral. V.A.M.S. § 400.9-402. Moreover, the security agreement itself refers to "All our inventory and equipment, wherever located. . . ."

Notwithstanding the sufficiency of the security agreement, the District Judge found that language in the security agreement authorizing a commercially reasonable disposition of chattels constituted an express waiver by C.I.T. of its lien, provided the sale was a "commercially reasonable disposition."[4] In so holding, the District Judge read the "commercially reasonable disposition" clause entirely out of context and erroneously interpreted this provision. The clause grants to C.I.T. "all the rights of a secured party under the Uniform Commercial Code. . . ." Section 9-504(1) of the Uniform Commercial Code authorizes the sale of collateral, in event of default, provided the disposition is "commercially reasonable."[5] The clause upon which the Dis-

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if C.I.T. in good faith deems the indebtedness or the chattels unsecure:

> (3) You shall have a security interest in all our inventory and equipment, wherever located and whether or not financed hereunder, and you shall have the same rights with respect thereto, including removal, as you have to chattels hereunder.

[4] Quoted in text *supra* p. 3.

[5] V.A.M.S. § 400.9-504 provides:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or

trict Judge relied simply provided that a private sale of a chattel to a dealer in such types of chattels for the amount originally paid by Swanson for such chattel or at a lesser fair price would be a "commercially reasonable disposition thereof." It obviously referred only to a disposition by C.I.T. in the event it exercised its right as a secured party to dispose of the collateral and thereby assured the debtor that a fair price would be obtained for the chattels used to reduce or satisfy the debt.

While the District Judge predicated his finding of waiver upon express language in the security agreement, he also indicated that he would be "inclined to find that by this course of dealing the defendant [C.I.T.] had waived its lien entirely by treating Swanson's second hand car business as completely separate from the new car business which defendant was financing." Since we reject the express waiver theory, we must deal briefly with the trial court's alternative comment. The court found that C.I.T. had refused to finance the used cars, was aware that they were being financed elsewhere and made no effort to determine whether Swanson was selling the used cars in the "ordinary course of business". While the Uniform Commercial Code does not preclude the application of principles of implied-in-law waiver or estoppel,[6] such findings do not support a legal conclusion based upon either theory. *See* V.A.M.S. § 400.9-205. The security agreement extends to automobiles, whether or not financed by C.I.T. The court made no finding, nor do we per-

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following any commercially reasonable preparation or processing. . . .

* * * * * * *

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. . . .

* * * * * * * *

[6] V.A.M.S. § 400.1-102; § 400.1-103.

ceive anything from the record from which the court could find that Weidinger Chevrolet relied upon the course of dealing between C.I.T. and Swanson to its detriment. Nor was there any evidence of any side agreements between the parties from which waiver may be inferred.

Sales to Weidinger Chevrolet

Having determined that C.I.T. acquired a valid security interest in the Swanson used cars, which was not waived by express agreement or course of conduct, we next consider the legal effect of the sales from time to time by Swanson to Weidinger Chevrolet for the purpose of reducing Swanson's legal obligation to GMCO. The security agreement authorized Swanson "to exhibit and to sell each chattel only to buyers in the ordinary course of business."[7] C.I.T. was aware of sales by Swanson to Weidinger Chevrolet. There is no evidence that these sales were at less than arms length and no contention of fraud appears.[8] The finding of the court that the prices paid for the

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[7] V.A.M.S. § 400.1-201(9) provides:

(9) 'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. 'Buying' may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

[8] C.I.T.'s reliance on *Commercial Credit Corp. v. Joplin Automobile Auction Co.*, 430 S.W.2d 440 (Mo. App. 1968), is misplaced. In that case an auctioneer who had handled arms length sales in the past was held not to be a buyer in the ordinary course of business because it was only acting as an agent and also because the transfer was made to satisfy a debt to the auctioneer. Here, the transfer was in aid of liquidating a debt to a third party—GMCO, but was not "in total or partial satisfaction of a money debt" to the buyer, Weidinger Chevrolet.

automobiles were fair is not clearly erroneous. From this it follows that while C.I.T. possessed a valid security interest in all of the cars, the sales by Swanson to Weidinger Chevrolet of the 22 cars at issue here was in the ordinary course of business and hence Weidinger Chevrolet acquired title free of such security interest. V.A.M.S. § 400.9-307(1).

The Consignment

We next turn to a consideration of the consignment of the automobiles by Weidinger Chevrolet to Swanson. As previously noted, Weidinger frequently allowed cars which had been acquired from Swanson under the side arrangement to remain on the Swanson lots to be sold on commission by Swanson.[9] Section 2-326 of the Uniform Commercial Code[10] provides in part:

> (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
>
> * * * * * * * *
>
> (b) a 'sale or return' if the goods are delivered primarily for resale.
>
> (2) Except as provided in subsection (3), * * * goods held on sale or return are subject to such claims while in the buyer's possession.

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[9] Leonard Weidinger testified that Swanson would contact him with respect to a prospective customer for one of the cars acquired by Weidinger Chevrolet; Weidinger would set a price; Swanson would call back and direct how to make out the bill of sale; and, according to Weidinger, "He would give me what I wanted, I don't know what he got from the customer." Sometimes Swanson paid GMCO the amount due on the car and settled the balance with Weidinger Chevrolet at a later time.

[10] V.A.M.S. § 400.2-326.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum'. However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the article on secured transactions (article 9).

In *Mann v. Clark Oil & Refining Corp.*, 302 F. Supp. 1376 (E.D. Mo. 1969), *aff'd per curiam*, 425 F.2d 737 (8th Cir. 1970), a trustee in bankruptcy sued defendant oil company to set aside certain preferential transfers by bankrupt to defendant. Of particular concern was the repossession of $630 worth of gasoline in bankrupt's possession under a "consignment" contract with defendant. The court held that §2-326 was applicable and therefore the only question was whether bankrupt's business was conducted under the oil company's name or his own. Finding the business was under bankrupt's name, the court held that the gasoline was subject to the interest of general creditors. The court also held that the consignment agreement was actually a security agreement and, since not perfected un-

der the Code, was subordinated to the interest of a creditor holding a judicial lien.

Weidinger Chevrolet neither posted signs nor complied with the filing provisions of Article 9 of the Uniform Commercial Code. Nor did plaintiff establish that Swanson was "generally known by his creditors to be substantially engaged in selling the goods of others." Upon this record we hold that the 22 cars, although owned by Weidinger Chevrolet, were in the possession of Swanson under circumstances deemed to be a "sale or return", and hence subject to the claims of Swanson's creditors. C.I.T.'s previously perfected security interest reattached to such cars as inventory subject to such interest.[11]

The Fuentes Defense

On this appeal, plaintiff contends that even if the court's findings and decision were erroneous, the Missouri statute under which the automobiles were seized is unconstitutional and therefore plaintiff's motion for summary judgment should have been sustained. This contention is without merit.

The Missouri replevin statute, V.A.M.S. chapter 533, is a possessory action. By following its procedure, C.I.T. was en-

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[11] *See* V.A.M.S. § 400.9-204(3). Professor Ray David Henson, discussing what is sometimes called the Mississippi River theory of inventory and accounts financing, writes:

> Within our terms of reference, "a security agreement may provide that collateral whenever acquired, shall secure all obligations covered by the security agreement." This is in line with the pre-Code law of many states in various areas, and raises no significant problems. It is true that a security interest cannot attach until the debtor has rights in the collateral. Once the interest attaches, however, when the collateral is inventory (as inventory would normally be understood), it very clearly continues, although the quantity and possibly even the quality of the inventory may, as does Huck Finn's river, undergo constant change. (footnotes omitted)
>
> R. D. Henson, *Secured Transactions Under the Uniform Commercial Code* 132 (1973).

abled to obtain possession of the automobiles without a pre-seizure hearing. Plaintiff contended in its motion for summary judgment that such seizure was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and in violation of Article I, Section 10 of the Missouri Constitution. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). The Missouri Supreme Court, in *State ex rel. Williams v. Berrey*, 492 S.W.2d 731 (Mo. en banc 1973), declined to hold chapter 533 facially unconstitutional. It did, however, hold that a seizure under the statute *pendente lite* must be preceded by a court hearing which will satisfy the requirements of *Fuentes*. Plaintiff cites other cases in which similar statutes have been held to be unconstitutional. *McClellan v. Commercial Credit Corp.*, 350 F. Supp. 1013 (D. R.I. 1972), *aff'd sub nom. Georges v. McClellan*, 409 U.S. 1120 (1973); *Gunter v. Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973).

It would be inappropriate for us, upon this record, to pass upon the constitutionality of the Missouri replevin statute. *Fuentes* was a civil rights action in which damages were sought for breach of plaintiff's civil rights. *Berrey, supra*, was a mandamus action in which the court ordered restoration of possession because of the defective order of possession in the case below. *Fuentes* is here raised as a shield, rather than as a sword, and the defense comes too late. Had C.I.T. acquired possession of the automobiles through self-help, as they had a clear right to do under the security agreement and under the Uniform Commercial Code,[12] plaintiff could not have compelled.[13] A flaw in the means of acquisition does not impair

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[12] V.A.M.S. § 400.9-503.

[13] *Nichols v. Tower Grove Bank*, No. 73-1621 (8th Cir., May 13, 1974); *Nowlin v. Professional Auto Sales, Inc.* and *Mayhugh v. Bell Allen Chevrolet Co.*, Nos. 73-1348 and 73-1450 (8th Cir., April 25, 1974). *See Bichel Optical Laboratories, Inc. v. Marquette National Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973).

the validity of the security interest or C.I.T.'s right to dispose of the property as permitted by the security agreement, which vested C.I.T. with all of the rights of a secured party under the Uniform Commercial Code. *See* V.A.M.S. §400.9-205. A proper challenge to the Missouri replevin statute, on constitutional grounds, should await a more appropriate vehicle, and we decline to pass upon it here.

Judgment reversed.

APPENDIX B

In the United States District Court for the
Western District of Missouri
Southern Division

Weidinger Chevrolet, Inc., a Corporation, Plaintiff, vs. Universal C.I.T. Credit Corporation, a Corporation, Defendant.	Civil Action No. 2597

Opinion and Judgment

(Filed June 27, 1973)

The plaintiff corporation is a Chevrolet agency in Vienna, Missouri. The president and sole stockholder (with his wife) of this company owns one-third of the stock of, and is an officer of GMCO Agency, Incorporated, a loan company located in the same town.

In September of 1964 this loan company entered into a floor plan agreement with Jim Swanson, a second hand car dealer located in Belle, Missouri; and "floor planned" his stock of used cars from then until the situation arose which caused this suit.

Mr. Swanson signed individual notes on each car floor planned, and delivered the Missouri title to the cars either assigned in blank, or to him, to the loan company, which held it until the car was sold and the note paid. The floor plan agreement required all notes to be reduced by 10% at the end of

a ninety-day period. There was no security agreement covering this arrangement ever filed for record.

In March of 1968, Swanson secured a Chrysler-Plymouth dealership and entered into a floor plan agreement with the defendant Universal C.I.T. This was a printed form dealing mostly with the financing of new cars as they were obtained from the factory, but also contained a provision creating a security interest in all of Swanson's inventory and equipment, whether or not it was financed under the agreement. This "agreement for wholesale financing" was filed of record by the defendant.

At the time Swanson entered into this agreement with Universal C.I.T. the latter had full knowledge that Swanson was financing his entire used car inventory with GMCO, and Universal C.I.T. refused to furnish financing of Swanson's used car inventory. There is no question that after this refusal Universal C.I.T. had full knowledge that Swanson was "floor planning" his second hand cars with GMCO, and made no objection to this continuing arrangement and course of dealing between GMCO and Swanson.

If Swanson had difficulty selling a second hand car, or didn't want to pay the 10% reduction of the principal of a loan on a particular car at the end of ninety days, he would call Weidinger and offer to sell him the car for the amount of the loan with GMCO. If Weidinger accepted, he would deliver to GMCO a Weidinger Chevrolet note for the same amount Swanson owed. Swanson's note would be cancelled and returned to him, and he would transfer the title of the car (still held by GMCO) to Weidinger Chevrolet. Frequently the car was left on one of Swanson's used car lots (he had two in towns other than Belle) and Swanson would receive a commission if he sold the car for Weidinger. There is no evidence that Universal C.I.T. had any knowledge of those transactions.

The evidence did show that it is not unusual for one second hand dealer to have a car for sale on another dealer's lot, and to pay a commission to the other dealer if he sold the car.

In December of 1969, Universal C.I.T. discovered that Swanson had sold about $52,000 worth of new Chryslers and Plymouths which it had floor planned, and he had not paid off the indebtedness to Universal C.I.T. on any of these cars. This is called "S.O.T." (sold out of trust) in the industry, and causes a great deal of exictement when discovered by the finance company.

Universal C.I.T. immediately replevined all used cars on Swanson's three lots, asserting a first lien under its "agreement for wholesale financing." Twenty-two of these cars were titled in the name of the plaintiff, Weidinger Chevrolet. When informed of this fact, immediately after the seizure, defendant refused to return the cars to Weidinger and has sold them and retained the proceeds. This suit is for the value of the cars which defendant converted to its own use.

All twenty-two of the cars in question had been floor planned for Swanson by GMCO. Prior to the date of taking Weidinger Chevrolet had executed its note for the amount of the floor plan note of Swanson; Swanson's note had been cancelled and returned; and all the certificates of title had been assigned to Weidinger Chevrolet.

The defendant argues that, in some way, the sale of these cars by Swanson to Weidinger was fraudulent and resulted from a conspiracy between GMCO, Weidinger and Swanson to defraud Swanson's creditors. There is absolutely no evidence to support this contention, and the Court specifically finds that these transactions were legitimate, arms length dealings between the parties involved. Weidinger's financial position was much stronger than Swanson's and GMCO was happy to receive its note in place of Swanson's. Swanson had received the full loan value of the car

(and sometimes more than "book" loan value) in cash, and was in financial trouble in 1969, and was satisfied to transfer the title and be relieved of his obligation to pay interest and reduce the principal. If Weidinger thought the car was a good buy for the amount loaned against it, the car was bought.

All the parties agree that the alleged lien of the defendant on Swanson's inventory of cars held for resale could not be asserted against a purchaser for value in the ordinary course of business. But the defendant argues that these sales to Weidinger Chevrolet did not fall in this category. The evidence, however, clearly indicated that dealers frequently "wholesale" cars back and forth between themselves in the ordinary course of business.

This defendant, for over a year and a half, after the financing agreement with Swanson knew that he was actively engaged in the second hand car business, since he had three used car lots. The defendant claims now to have had a lien on all of Swanson's second hand cars during this period of time, but never asked him to account for any of the proceeds of the sale of a single used car during that entire period of time. Nor did the defendant investigate whether Swanson was selling the cars in the "ordinary course of business" as defendant interprets this phrase, that is, one at a time at retail to individuals, or in wholesale lots to other dealers.

The defendant further knew that Swanson was borrowing money on all this second hand car inventory from GMCO, and approved of this procedure. In fact, it made inquiries of GMCO as to whether Swanson was paying promptly. This Court would be inclined to find that by this course of dealing the defendant had waived its lien entirely by treating Swanson's second hand car business as completely separate from the new car business which defendant was financing. It could certainly be argued that by this course of conduct the defendant would be estopped from asserting a lien against a party in the shoes of Weidinger who knew of the conduct of Universal C.I.T.

However, this case can be decided under the plain words of the "agreement for wholesale financing," dated March 8, 1968, upon which defendant relies for its lien. One paragraph of that agreement states:

> "You (Universal C.I.T.) shall have all the rights of a secured party under the Uniform Commercial Code or at common law or in equity or under any statute or under this agreement. Your rights and remedies hereunder shall be cumulative. It is agreed that new and *used* automobiles, trucks, . . . are the subject of widely distributed standard price quotations and are customarily sold on and in a recognized market. A private sale of any chattel *to a dealer in such types of chattels* for the amount we (Swanson) originally paid for such chattel or at any lesser fair price is a commercially reasonable disposition thereof."

The above wording, which is the defendant's own language in its printed form, clearly recognizes and authorizes the wholesaling of used cars to another dealer in used cars. The only meaning that can be attributed to this language is that Universal C.I.T. waives its lien (created in the paragraph immediately preceding the quoted language) if the sale is a "commercially reasonable disposition."

Since Universal C.I.T. introduced evidence (on the damage issue) that the twenty-two cars involved were worth far less than the amount plaintiff paid for each of them, it cannot claim that the price paid was not fair as far as Swanson was concerned.

The Court finds that the plaintiff was the owner of the twenty-two cars in question at the time defendant seized and converted them, and that defendant had no valid and enforceable lien superior to plaintiff's title.

The evidence on the value of the cars at the time of the conversion was scanty. After its precipitous action in seizing the

cars, the defendant stored them in an open field, for about five months of severe winter weather, without any protection from the elements or vandals. The defendant made no appraisal of the cars at the time of taking, and did not even record the physical condition of them. Defendant's witnesses testified that all the cars but one were driven off under their own power, but there is no evidence whether the one that was towed simply had a dead battery or a missing motor.

Plaintiff's evidence, based on the NADA book values, and plaintiff's president's personal appraisal, fixed the reasonable value of the cars at $34,290. This is corroborated by the total of the notes signed by plaintiff for the purchase of the cars. The Court finds that the reasonable market value of the twenty-two cars at the time of taking was $34,290. The Court computes the interest on this sum, at 6%, since the date of taking at $7,200.

The Court finds the issues on plaintiff's claim for punitive damages against plaintiff, and the issues on Defendant's counter-claim against the defendant.

Ordered that plaintiff be, and is hereby, awarded a judgment against the defendant in the amount of $41,490. Costs taxed to defendant.

/s/ WILLIAM COLLINSON
District Judge

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

September Term, 1973

Weindinger Chevrolet, Inc.,
Appellee,
vs.
Universal C.I.T. Credit Corp.,
Appellant.
No. 73-1681.

Appeal from the United States District Court for the Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 21, 1974

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

Weindinger Chevrolet, Inc.,
Appellee,
vs.
Universal C.I.T. Credit Corp.,
Appellant.
No. 73-1681.

Appeal from the United States District Court for the Western District of Missouri

On motion of appellee, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certirari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 3, 1974

SUPREME COURT, U. S.

FILED

NOV 15 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-200

WEIDINGER CHEVROLET, INC.,
Petitioner,

vs.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN L. HEARNE
KEITH & HEARNE
304 East High Street
Jefferson City, Missouri 65101
314-636-4146
Attorneys for Respondent

R. L. Stinecipher, Inc., 922 Cherry Street, Kansas City, Mo. 64106, 421-2900

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

VS.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner's Motion for Summary Judgment seeking to establish liability on its underlying cause of action an appropriate procedural method to raise the constitutionality of an alleged pre-judgment taking?

2. Did petitioner waive, or is it estopped from asserting, its right to raise the constitutionality of the pre-judgment taking?

3. Can the constitutionality of the pre-judgment taking be properly raised in petitioner's action for conversion

of the automobiles taken; is this action an appropriate vehicle for considering the constitutionality of the pre-judgment taking?

4. Is petitioner's action an appropriate case in which to decide the question of the retroactivity of the "Fuentes-Mitchell v. Grant" doctrine?

5. Did the Missouri Statutes, Rules of Civil Procedure, and case law procedures provide the petitioners with adequate due process safeguards?

6. Do the facts of the instant case reveal "a special situation demanding prompt action" as suggested in the "Fuentes-Mitchell v. Grant" doctrine?

7. Is the petitioner, who was not in de facto possession of the automobiles in question, a proper party to raise the constitutionality of the pre-judgment taking?

STATUTORY PROVISIONS INVOLVED

RSMo. Sec. 400.9-302 When filing is required to perfect security interest—security interests to which filing provisions of this article do not apply

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under section 400.9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under sec-

tion 400.9-304 or in proceeds for a ten-day period under section 400.9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of two thousand five hundred dollars; but filing is required for a fixture under section 400.9-313 or for a motor vehicle required to be licensed;

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under section 400.9-313 or for a motor vehicle required to be licensed;

(e) an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (section 400.4-208) or arising under the article on sales (see section 400.9-113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by a public official on a certificate or a duplicate thereof.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

(5) The filing provisions of this article do not apply to a mortgage security interest in or to a mortgage of property of any description or any interest therein when such a mortgage shall have been or shall be made by a corporation which is a railroad or a public utility as defined in the public service commission law, section 386.020, RSMo, or by a corporation, domestic or foreign, organized for the purpose of constructing, acquiring, owning or operating a railroad or a public utility, as so defined, in whole or in part in this state, but such a mortgage shall be recorded and filed in accordance with the following requirements:

(a) Such a mortgage shall be recorded in the office of the county recorder of deeds of each county in this state in which any real estate described in such mortgage is situated; and

(b) Such mortgage shall be filed in the office of the secretary of state if such mortgage includes any rolling stock, movable equipment or machinery or any other personal property.

In lieu of recording or filing an original of any such mortgage or of any supplement or amendment thereto, a true copy thereof may be recorded or filed with an affidavit by the mortgagor or the mortgagee, or an agent of either, that it is a true copy. Any such mortgage shall be a lien on the real estate therein described from the respective dates of filing such mortgage for record with the recorders of deeds of the counties in which it is so filed and shall be a lien on the rolling stock, movable equipment and machinery and other personal property included therein from the date of the filing of such mortgage with the secretary of state. If any such mortgage, filed or recorded as provided herein, by its terms creates a lien upon any property which may be acquired by the mortgagor after such mortgage is made, it shall be a lien upon all the interest of the mortgagor therein from the date of its acquisition by the mortgagor. For each mortgage and for each supplement and amendment to such mortgage filed with the secretary of state pursuant to the provisions hereof, the secretary of state shall charge and collect a fee of one dollar, and the secretary of state shall indorse on each such mortgage, supplement or amendment the date and time of filing thereof in his office and appropriate legend to index the filing thereof. When any such mortgage is satisfied or canceled and evidence thereof shall have been filed in the office of the secretary of state, the secretary of state shall enter the date of satisfaction or cancellation thereof in an appropriate record in his office. The secretary of state shall furnish to the person filing any such mortgage, supplement or amendment thereto or any evidence of satisfaction or cancellation of any such mortgage a certificate of such filing. (L. 1963 p. 622 § 9-302)

MISSOURI SUPREME COURT RULES OF CIVIL PROCEDURE

Rule 99.01 When Possession of Personal Property is Claimed—What Proceedings Shall Be Had

If the plaintiff claim in his petition the possession of specific personal property, he may, at the time of filing his petition, or at any other time afterward, before the rendition of judgment in the cause, file his affidavit, or the affidavit of some other person in his behalf, showing: (1) that the plaintiff is the owner of the property claimed, sufficiently describing it, or is lawfully entitled to the possession thereof; (2) that it is wrongfully detained by the defendant; (3) the actual value thereof; (4) that the same has not been seized under any process, execution or attachment against the property of the plaintiff; and (5) that plaintiff will be in danger of losing his said property, unless it be taken out of the possession of the defendant, or otherwise secured.

Rule 99.02 Order of Delivery Shall be Made—When—By Whom

Upon filing such affidavit, the court or judge or clerk in vacation shall make an order requiring the defendant to deliver the property specified in the affidavit to the sheriff, and requiring the sheriff, if the same be not delivered to him, to take it from the defendant and deliver it to the plaintiff.

Rule 99.03 Before Property Taken, Plaintiff to Deliver Bond to Sheriff—Condition of Bond

The sheriff shall not receive or take such property until the plaintiff shall deliver to him a bond, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property stated in the affidavit, for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action.

Rule 99.04 Sheriff Shall Take and Deliver Property to Plaintiff—When

Upon such bond being executed as aforesaid, the sheriff shall receive the property, or, if the same be not delivered, shall take the property and deliver it to the plaintiff, unless, before such delivery to the plaintiff, the defendant shall, with two or more sufficient sureties, to be approved by the sheriff, execute a bond to the plaintiff, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery of said property to the plaintiff, if such delivery be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for injuries to the property, and for the taking and detention or detention thereof, and all costs which may accrue in the action.

Rule 85.01 Attachment, When Issued—Parties To—Causes For

In any court having competent jurisdiction, the plaintiff in any civil action may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any one or more of the following cases:

(1) Where the defendant is not a resident of this state;

(2) Where the defendant is a corporation, whose chief office or place of business is out of this state;

(3) Where the defendant conceals himself, so that the ordinary process of law cannot be served upon him;

(4) Where the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him;

(5) Where the defendant is about to remove his property or effects out of this state, with the intent to defraud, hinder or delay his creditors;

(6) Where the defendant is about to remove out of this state, with the intent to change his domicile;

(7) Where the defendant has fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors;

(8) Where the defendant has fraudulently concealed, removed or disposed of his property or effects, so as to hinder or delay his creditors;

(9) Where the defendant is about fraudulently to convey or assign his property or effects, so as to hinder or delay his creditors;

(10) Where the defendant is about fraudulently to conceal, remove or dispose of his property or effects, so as to hinder or delay his creditors;

(11) Where the cause of action accrued out of this state, and the defendant has absconded, or secretly removed his property or effects into this state;

(12) Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or for the seduction of any female;

(13) Where the debtor has failed to pay the price or value of any article or thing delivered, which by contract, he was bound to pay upon the delivery;

(14) Where the debt sued for was fraudulently contracted on the part of the debtor.

Rule 85.03 The Affidavit

An affidavit alleging any one of the causes set forth in the several paragraphs of Rule 85.01, in the language of such paragraphs, shall be held good and sufficient.

Rule 85.04 Attachments, How Obtained—Affidavits and Bond—Exceptions—May Be Issued and Served on Sundays

Any plaintiff wishing to sue by attachment may file in the clerk's office of the court in which the attachment is instituted, or with the magistrate before whom the suit

is brought, a petition or other lawful statement or exhibit of his cause of action, and, except in suits instituted by the state or a county in its own behalf, and except in cases where the defendant is not a resident of the State of Missouri, in either of which cases no bond shall be required shall also file an affidavit and bond, and, thereupon, such plaintiff may sue out an original attachment, if in the circuit court, against the lands, tenements, goods, moneys, effects and credits of the defendant in whosesoever hands the same may be; or, if before a magistrate, against the goods, moneys, effects and credits of the defendant, wheresoever found within the county; and where the affidavit for an attachment states that the plaintiff will lose his claim, unless the writ of attachment issues, and be served on Sunday or any other legal holiday, the writ may be issued and served on that day; provided that when any writ of attachment has issued against a nonresident and the plaintiff has given no bond, the attachment shall be dissolved as of course, and the lands, tenements, goods, moneys, effects and credits of the defendant taken or levied upon under such writ of attachment shall be released therefrom, upon the defendant entering his appearance and filing his answer to the merits of the case; unless the plaintiff shall, within ten days from the date of the filing and service of defendant's answer and entry of appearance, file his bond in said case in double the amount sworn to in the affidavit of the plaintiff; provided, however, upon good cause shown, the circuit judge may grant an additional ten days to file said bond; the bond herein provided for as to its effect and the obligation of the parties thereto shall be the same as if filed before the writ of attachment was issued.

Rule 85.05 Form of Affidavit, by Whom Made

The affidavit shall be made by the plaintiff, or some person for him, and shall state that the plaintiff has a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is ..... dollars, and that he has good reason to believe, and does believe, in the existence of one or more of the causes which according to the provisions of Rule 85.01 would entitle the plaintiff to sue by attachment.

Rule 85.06 Bond, By Whom Executed—Conditions

The bond shall be executed by the plaintiff, or some responsible person as principal, and one or more sureties, resident householders of the county in which the action is to be brought, in a sum at least double the amount sworn to in the affidavit, payable to the state of Missouri, conditioned that the plaintiff shall prosecute his action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him, and pay all damages and costs that may accrue to any defendant, garnishee or interpleader by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon, and pay all damages and costs that may accrue to any sheriff or other officer by reason of acting under the writ of attachment, following the instructions of the plaintiff.

Rule 85.07 Bond, By Whom Approved—Attachment Not to Issue Until

The clerk shall judge of the sufficiency of the penalty and the security in the bond; if they be approved, he shall endorse his approval thereon, and the same, together with the affidavit and petition or other lawful statement of the cause of action, shall be filed before an attachment shall be issued; provided, that in all cases where the clerk shall be a party to the suit, the sheriff shall pass on and determine the sufficiency of the bond.

Rule 85.39 Motion to Dissolve the Attachment

In all cases where property, effects or credits shall be attached, the defendant may file a motion to dissolve the attachment, verified by affidavit, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out.

Rule 85.40 Proceedings on, Burden of Proof Judgment, Appeal, Effect of Appeal

The court shall hear evidence upon the issue joined by the motion to dissolve the attachment, and the burden shall be upon the plaintiff to prove the ground of attachment; and the court shall make an order either sustaining or overruling the motion to dissolve and, if the motion is overruled, the attachment shall remain in full force and effect unless the plaintiff shall voluntarily dismiss the same. Upon the trial of the case upon the merits, there shall be incorporated in the judgment rendered in the cause, as a part of such judgment, a finding and judgment either that the attachment be dissolved and the sureties thereon be released, or that the attachment be sustained, such finding to be in accordance with the action

of the court theretofore taken on the motion to dissolve the attachment. Either party may appeal from said judgment after timely filing of a motion for a new trial and adverse action thereon, and the giving of an appeal bond by the appellant in such amount as the court may require shall operate as a supersedeas of the judgment appealed from. If the bond is given by the plaintiff, it shall preserve the attachment in full force until the final determination of such appeal in the appellate court, or of the case upon a retrial in the trial court. If the plaintiff, in case the judgment or findings be against him, fails to appeal therefrom, or if such appeal be dismissed, or, if upon an appeal, such judgments or findings be affirmed, he and his sureties shall be liable on their bond for all damages and costs occasioned by the attachment or any subsequent proceedings connected therewith; provided that such appeal shall be taken and perfected as in ordinary civil actions.

ADDITIONAL STATEMENTS OF FACT

Petitioners brought an action against respondent in trover for conversion of twenty-two (22) automobiles in which it sought damages from the respondent for the value of said automobiles in the amount of $34,145.00, together with interest and costs.

Petitioner alleged that on or about December 11, 1969, the respondent converted to its own use twenty-two (22) automobiles being the property of the petitioner and being described in said complaint; this suit was filed on February 26, 1970. (Tr. 2, 4). Respondent's answer denied these allegations and affirmatively pleaded that its right to possession of the automobiles was superior to that of the petitioner; in its counterclaim respondent asserted that

the petitioner had received certificates of title to the automobiles described in its complaint from one Jimmy M. Swanson for the purpose of defrauding the defendant and hindering and delaying its collection of indebtedness in the amount of $72,500.00 owed by Swanson to respondent and sought damages allegedly caused it by result of such fraud (Tr. 6, 7). By pre-trial order No. 2 (Tr. 10) it was admitted by the parties as follows: That from September 15, 1964, until the time of the filing of this suit that GMCO Agency Inc. (an automobile dealer financing company) had floor planned financed used cars for one Jimmy Swanson, d/b/a Swanson Chrysler Plymouth; that said floor planning was pursuant to a floor plan agreement between those parties, said agreement being Exhibit 1 to Pre-Trial Order No. 2 (Tr. 10); that it was the general practice of GMCO to retain in its possession the title to each motor vehicle floor planned by it, but that it did not file or record a financing statement or other evidence of security interest with the recorder of any county or with the Secretary of State in connection with its used car floor plan agreement with Swanson; in the month of March, 1968, J. W. Carmichael, who was district manager of the Jefferson City office of C.I.T., procured the execution by Swanson of an "Agreement for Wholesale Financing" by which C.I.T. financed new cars for Swanson (Defendant's Exhibit 1, Tr. p. 19); C.I.T. knew at this time that Swanson had entered into a used car floor plan agreement with GMCO and C.I.T. did not intend to floor plan used cars for Swanson; C.I.T. filed a U.C.C. Financing Statement (Defendant's Exhibit 2, Tr. p. 22) with the Secretary of State of the State of Missouri and with the Recorder of Deeds of Maries and Phelps Counties; C.I.T. did not at any time prior to December 6, 1969, the date of petitioner's suit, floor plan any used cars for Swanson; C.I.T. consented to the sale of used motor vehicles by

Swanson in the normal course of business to a bona fide purchaser; petitioner was a corporation with all outstanding shares of stock held by Leonard Weidinger and his wife, Lucille, and during the time that GMCO had been floor planning used cars for Swanson, Leonard and Lucille Weidinger were the owners of one-third of the issued and outstanding shares of GMCO, Leonard Weidinger being vice president and treasurer of GMCO and also president of the petitioner corporation. Customarily upon default by Swanson in his used car floor plan with GMCO, and on other occasions, petitioner paid off the indebtedness to GMCO and thereby acquired titles to the motor vehicles which secured such indebtedness. Through the dates of December 6, 1969, and December 16, 1969, C.I.T. took possession of twenty-two motor vehicles (described in the amended complaint) under Writs of Replevin and Attachment against the property and effects of Swanson, petitioner not being made a party to either the replevin or the attachment suits; prior to December 6, 1969, GMCO had floor planned for Swanson fourteen of the twenty-two motor vehicles described in the Amended Complaint and at the time C.I.T. took possession of the twenty-two motor vehicles, certificates of title to fourteen of them had been assigned to petitioner; petitioner had placed all of the motor vehicles on used car lots of Swanson for sale on commission basis by Swanson with the proceeds going to petitioner, or for sale by petitioner itself without a commission. No notice of petitioner's ownership of the twenty-two motor vehicles alleged in the complaint was posted on or appended to the motor vehicles or posted on the premises where they were located at the time respondent took possession; between the dates of December 6, 1969, and December 16, 1969, respondent without consent or authorization from petitioner, took possession of the twenty-two motor vehicles described in the Amended Complaint.

The trial court found that immediately prior to instituting the suits against Swanson, respondent had discovered that Swanson had sold out of trust about $52,000.00 worth of new Chryslers and Plymouths (Tr. 29, 201).

Mr. James Dyer, who was a branch manager for respondent at the time the suit against Swanson was filed, testified that on the date the replevin suit against Swanson was filed he accompanied the sheriff to Belle, Missouri. Swanson was found in downtown Belle and the Sheriff served him with the replevin papers at that place and agreed to meet Dyer and the Sheriff at his dealership. Swanson did not show up, and when the Sheriff and Dyer arrived at the dealership Swanson's employees were driving away the used cars (Tr. 144). A few days prior to filing the replevin and attachment suits, Dyer prepared a list of cars to be replevined by a physical inspection of the cars on the lot; while there Dyer saw a stack of titles in the dealership which Swanson's employees told him were the titles to the cars, but Swanson had instructed his employees not to let Dyer see them; Swanson's sales manager and bookkeeper told Dyer that all the cars on the lot at Belle belonged to Swanson (Tr. 138, 139, 140, 141).

Perry Clark, a C.I.T. employee in 1969, testified that he made inspection trips to Swanson's various used car lots at Belle, Rolla, and Chamois, and during those trips he would make observation with reference to Swanson's used cars, although he did not make a car by car inventory thereof. During the course of these trips Clark had occasion to meet with Leonard Weidinger, as an officer of GMCO, to discuss the status of Swanson's accounts. Weidinger never mentioned that he owned some of the cars on Swanson's lots, never mentioned that GMCO was having any problem with Swanson on his notes, and never

mentioned that petitioner was paying off or assuming some of the Swanson notes as they became due (Tr. 147, 148). The first that Clark knew that Weidinger was claiming any interest in the cars in question was on the date that the replevin suits were filed against Swanson; on that date he had been in Rolla at Swanson's used car lot for several hours when one of Swanson's salesmen came from the dealership and said "we are now working for Mr. Weidinger, Mr. Swanson has signed all the titles to him".

None of respondent's employees who were called to testify, and none of Swanson's employees who testified, had any knowledge (prior to the filing of the replevin and attachment suits) that petitioner owned or claimed any interest in any of the used cars on Swanson's car lots (Tr. 177, 197, 214, 274).

The Missouri Department of Motor Vehicle Registration in Jefferson City, Missouri, was not informed of any of the assignments or purported sales from Swanson to Weidinger, by application for title, prior to the filing of the suits by respondent against Swanson (Plaintiff's Exhibit 4, Tr. 221-240, Defendant's Exhibits 6, 7, 8, 9, 10, 11, Tr. 271, 280, 289, 298, 306, 314).

Jimmy Swanson, on his dealer's monthly sales reports submitted to the Missouri Department of Revenue, Division of Collection, Motor Vehicle Unit, in which he was to report the sale of all new and used motor vehicles, failed to report any of the sales or assignments of the motor vehicles in question to Weidinger Chevrolet (Defendant's Exhibit 4, Tr. 249-268). Titles to the automobiles in question were assigned by petitioner to respondent in April of 1970, so that the automobiles could be sold by respondent in order to mitigate the damages and to prevent further depreciation (Tr. 67, 81, 195). By agreement of

the parties, the trial of the liability issue was had to the court without a jury on July 7 and July 8, 1971 (Tr. 3) and trial of the balance of the issues was had before the court without a jury on May 24, 1973 (Tr. 3). Between the two trial dates, on December 18, 1972, petitioner filed a Motion for Summary Judgment in which it prayed for "a summary judgment in its favor on the issue of liability . . ." (Tr. 3, 24). After the close of the evidence on May 24, the Court took the case under advisement and on June 27, 1973, the court filed an opinion and judgment awarding the petitioner $41,490.00 (including interest) against the respondent and taxing the costs to the respondent (Tr. 3, 27).

Due to the fact that petitioner was not a party to the original replevin and attachment suits, that the Motion for Summary Judgment filed in December of 1972 first raised the issue of lack of due process of law due to pre-judgment taking, and that there was no evidentiary hearing on this motion, the evidence as to the facts and circumstances surrounding the original suits and the original taking are not in the transcript or record of this case.

REASONS FOR DENYING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit, in holding that petitioner's raising of the constitutional questions under the Fourteenth Amendment came too late, does not present novel and serious constitutional questions, and is not in conflict with applicable provisions of the Supreme Court of the United States.

II. The decision of the Court of Appeals for the Eighth Circuit is not in conflict with the decision of another court of appeals on the same matter.

III. The decision of the Court of Appeals holding that the instant case was not an appropriate vehicle to challenge the constitutionality of the Missouri replevin statutes has not decided an important state question in conflict with applicable state law.

IV. The instant case, involving an action for trover and conversion in commercial transactions, is not an appropriate vehicle for deciding the retroactivity of the "Fuentes" doctrine as modified by *Mitchell* v. *Grant*.

ARGUMENT

I. The Opinion of the United States Court of Appeals for the Eighth Circuit, in Holding That Petitioner's Raising of the Constitutional Questions under the Fourteenth Amendment Came Too Late, Does Not Present Novel and Serious Constitutional Questions, and Is Not in Conflict with Applicable Provisions of the Supreme Court of the United States.

The opinion of the United States Court of Appeals for the Eighth Circuit in the instant case does not attempt to pass upon either the constitutionality of the Missouri replevin and attachment statutes or upon the taking of the automobiles in this case; it merely noted that on state of the record in this case it would be inappropriate to pass upon the constitutionality of these Missouri statutes. Respondent submits that this is precisely correct, for several reasons. First, the constitutional issue is here not being raised by a defendant whose actual possession of the property in question had been terminated by the replevin taking; it should be remembered that the original taking in the instant case arose out of a replevin case filed by the respondent against Jimmy Swanson, d/b/a

Swanson Chrysler-Plymouth. Petitioner had voluntarily relinquished its de facto possession of the automobiles by allowing them to remain on Swanson's used car lots for sale on a commission basis by him; petitioner's actual or de facto possession of the automobiles was therefore not terminated by the action against Swanson, but Swanson's possession thereof was terminated. Swanson is not a party to this litigation and has not raised the issue. Obviously, petitioner was not interested in the possession and use of these automobiles as automobiles per se; its interest in them was for sale purposes as part of its stock in trade and in obtaining the monetary value thereof. No doubt that is why petitioner instituted this suit as trover and conversion, in which it sought to obtain judgment for the value of the automobiles, rather than attempting to regain the actual possession of them. To this extent the instant case differs markedly from the other cases decided by this court for in them articles of property used in day to day living were involved. By this, we do not attempt to become involved in the argument as to applying different standards of due process to "the necessities of life" as opposed to property that are not necessities; we merely note that in each of the other cases the person whose possession was terminated was interested in the actual possession and use of the property in question, but that that is not the situation in the case at bar. Thus in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1963, the articles involved were a gas stove, a stereo phonograph, a bed, a table, and other household goods; a refrigerator, range, stereo and washing machine were the articles involved in the case of *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406, 94 S.Ct. .....; *McClellan* v. *Commercial Credit*, 350 F.Supp. 1013 (D.R.I. 1972), affirmed sub nom., *Georges* v. *McClellan*,

409 U.S. 1120 (1973), 93 S.Ct. 935, 35 L.Ed.2d 253, involved a family automobile, as did its companion case.

Secondly, the record in the instant case is almost devoid of the circumstances surrounding the taking of the automobiles in question, the pleadings involved, and neither does it show the affidavits and bonds in attachment and replevin filed by the respondent. The reason for this lack of evidence is both simple and obvious; petitioner was not a party to the original replevin and attachment suits, and when he did bring suit he did not seek to raise the issue of the alleged unconstitutionality of the taking. He sought to recover the value of the cars as of the date of the taking. During the pendency of this litigation the petitioner, at the request of the respondent and by way of a gentlemen's agreement, consented to the sale of the automobiles in question, in order to mitigate damages and prevent their further depreciation, and it furnished the respondent proper titles in order to effectuate such sale. The sale was accomplished during the spring and summer of 1970 and thereafter, on July 7 and 8, 1971, a trial of the liability issues involved in the trover and conversion case was held. It was not until almost a year and one-half after the trial of the liability issues that the constitutionality of the original taking was raised by petitioner, in its Motion for Summary Judgment filed on December 18, 1972. No evidentiary hearing was held on this motion, but it was argued immediately prior to the trial of the damage issue of the instant litigation, which was held on May 24, 1973. The trial court refused to grant the Motion for Summary Judgment and proceeded with the hearing of the damage issue. Therefore, none of the pertinent and relative facts surrounding the actual original taking ever became material and relevant to the issues in this litigation, as it was tried; this no doubt

gave rise to the Court of Appeals comment that it was inappropriate for them upon the record in this case to pass upon the constitutionality of the Missouri statutes.

Thirdly, it is entirely speculative and conjectural as to whether a notice to the defendant Swanson in the cases against him, with an opportunity for hearing prior to taking possession of the automobiles, would have been meaningful in this case. There was no formal or legal relationship between Swanson and petitioner; notice to Swanson would not have been notice to petitioner. Respondent, by searching the Motor Vehicle Registration records of the State of Missouri and by searching the U.C.C. filing records in the Secretary of State's Office of the State of Missouri would not have discovered any claimed interest by petitioner in the automobiles in question; this is for the reason that petitioner made no such U.C.C. filings and had not applied for title in its own name until long after this suit was instituted. Respondent had no prior knowledge of any claimed interest in the automobiles by petitioner, and even if respondent had followed a notice and pretermination hearing statute it would not have protected petitioner's claimed interest. When petitioner voluntarily placed its automobiles on Swanson's used car lots for sale, he assumed and took the risk of subjecting them to claims of Swanson's creditors; he could have minimized or prevented this risk by following the appropriate Uniform Commercial Code filing provisions (RSMo. 1969, Section 400.236 (3)) but did not choose to do so.

Summarizing this point, the instant case simply did not arise and was not in a proper posture for ruling on the issues of the constitutionality of the taking; the record necessarily made due to the procedural and substantive aspects of the case did not present the necessary facts for ruling, it did not involve the proper parties,

and the constitutional question was not timely presented. It was raised long after the trial of the underlying liability issues on the merits and after the property in question had long since been disposed of with the acquiescence and consent of the petitioner. As the Court of Appeals stated "Fuentes is here raised as a shield, rather than as a sword, and the defense comes too late".

II. The Decision of the Court of Appeals for the Eighth Circuit Is Not in Conflict with the Decision of Another Court of Appeals on the Same Matter.

Petitioner claims that the decision of the Court of Appeals in this case is in conflict with that of the Third Circuit in *In re Manufacturers Credit Corporation*, 441 F.2d 1313 (1971). That is simply not the case. Petitioner claims that the Missouri Motor Vehicle Registration Statute, RSMo., Section 301.210(1) prevails over the Uniform Commercial Code filing requirements, RSMo., Section 400.9-302. The Missouri Motor Vehicle Registration laws and the Missouri Uniform Commercial Code filing requirements have been carefully drafted to dovetail and work together. RSMo., Section 301.650 provides that the Motor Vehicle Registration provision for perfecting liens and encumbrances on motor vehicles do not apply to or affect . . . "(3) a lien or encumbrance on a motor vehicle or trailer created by a manufacturer or dealer who holds the motor vehicle or trailer for sale." Similarly the filing requirements of the Uniform Commercial Code, RSMo. Section 400.9-302 (3) provides that "the filing provisions of this article do not apply to a security interest in property subject to a statute . . . (b) . . . or in a motor vehicle *which is not* inventory held for sale. . .". The automobiles in question in this case were inventory held for sale, so the U.C.C. filing requirements do apply, and

they do involve a security interest in motor vehicles created by an automobile dealer, Swanson. Therefore the automobiles in question fall in the exception set forth in the Motor Vehicle Registration laws. *In re Manufacturers Credit Corp.*, supra, the Third Circuit case relied upon by petitioners, did not involve motor vehicles held for sale as part of the dealer's inventory, and did not involve a lien or security interest created by a dealer or manufacturer. There, the motor vehicles in question were a number of buses owned by a corporation which was engaged in the business of owning and leasing buses to operating companies. The lien was created by this owner, and in that situation the Third Circuit Court of Appeals quite properly held that the Motor Vehicle Registration and Encumbrances Laws applied rather than the Uniform Commercial Code filing laws; Washington was not a dealer or manufacturer of the buses, and was not holding them as inventory for sale, but was using them in their business. The instant case and the Third Circuit case involved different situations with different types of debtors and the two decisions are in no way in conflict.

III. The Decision of the Court of Appeals Holding That the Instant Case Was Not an Appropriate Vehicle to Challenge the Constitutionality of the Missouri Replevin Statutes Has Not Decided an Important State Question in Conflict with Applicable State Law.

Petitioner claims that the case at bar is in conflict with the case decided by the Supreme Court of the State of Missouri, en banc, in 1973, *State ex rel. Williams* v. *Berrey*, 492 S.W.2d 731. Petitioner is mistaken. The Missouri Supreme Court pointedly found ". . . the Court does not, by this decision, hold the pre-judgment possession provisions of the Missouri replevin statutes to be facially

unconstitutional." The Court of Appeals in the case at bar merely stated that this case was not an appropriate vehicle on which to challenge the constitutionality of the Missouri replevin statutes and, therefore, declined to pass on it. The cases are not in conflict. We have already pointed out at some length, under Point I, wherein our case differs markedly from the United States Supreme Court cases enunciating the pre-termination hearing doctrine. The Court of Appeals clearly differentiates the *Berrey* case from this one. There, plaintiff brought a mandamus action (incorrectly denominated a prohibition action) seeking restoration of possession of personal property consisting of a stove, refrigerator, beds, mattresses, springs and a bedroom set. In *Berrey* the mandamus proceeding was brought in Circuit Court to compel the Magistrate Court which had issued the Writ of Replevin to quash the summons and return and the Writ of Replevin and to dismiss the action; the defendant promptly raised the question of the constitutionality of the replevin statute, both in Magistrate Court and in Circuit Court. The Missouri case, then, involved a direct attack on the pre-judgment taking and sought relief in the form of restoring possession. Almost all the cases that have arisen have been in somewhat similar manner; they either have been brought under the Federal Civil Rights Act, 42 U.S.C., Sec. 1983, or have been injunction or mandamus proceedings or motions to dissolve the alleged unconstitutional pre-judgment taking. In the recent case of *Mitchell* v. *W. T. Grant Co.*, supra, the case arose out of a hearing on a motion to dissolve an alleged unconstitutional sequestration of the defendant's property. It should be carefully noted that all of the cases involve only an attack on the taking itself, and do not attempt to adjudicate the underlying issue of the main cause of action. However, this is precisely what the petitioner attempted to do in its

Motion for Summary Judgment in the case at bar (incidentally, filed three years after the original replevin and attachment suits had been instituted and some seventeen months after the trial of the liability issue had already been held). Petitioner, in its Motion for Summary Judgment, asked for a judgment "in its favor on the issue of liability", because of the unconstitutional taking. This attack, then, went to the underlying cause of action itself, and did not seek a reversal of the preliminary taking of the automobile and, in fact, did not seek damages for the alleged unconstitutional taking; petitioner's theory would appear to be that because of the alleged unconstitutional pre-judgment taking of the automobiles (from a different party) it is entitled to a judgment on the underlying cause of action without affording respondent a trial of such cause of action, and, incongruously, not seeking repossession of the automobiles in question or even damages for their alleged unconstitutional taking. It was for these reasons that the Court of Appeals correctly held that this case did not afford the appropriate vehicle for determining the constitutionality of the Missouri replevin and attachment statutes.

IV. The Instant Case, Involving an Action for Trover and Conversion in Commercial Transactions, Is Not an Appropriate Vehicle for Deciding the Retroactivity of the "Fuentes" Doctrine As Modified by Mitchell v. Grant.

For the many reasons argued in Points I and III of this brief, respondent contends that the constitutional due process requirement of a pre-termination hearing, or as modified by the case of *Mitchell* v. *Grant*, supra, does not apply, and cannot apply, to this case in its present posture. An additional reason for denying petitioner's writ

is that this case would directly call into question the retroactivity of the *Fuentes* doctrine. The trover and conversion action is not an apt, appropriate or proper type of proceeding in which to decide the retrospective application question. Already a federal court, in *Higley Hill, Inc.* v. *Knight,* 360 F.Supp. 203 (D.Mass. 1973) has held that under the factual situation presented in that case that *Fuentes* should not be given a retroactive application, except to the extent that where property remains attached the defendant should be given a fully adequate hearing upon request. We have previously pointed out that petitioner's suit was initiated in February, 1970 and that trial of the liability issue was had in July of 1971; the *Fuentes* case was handed down in June of 1972, and thereafter, in December of 1972 the constitutionality of the taking in this case was first raised by petitioner. A trover and conversion case is particularly inappropriate as a vehicle for deciding the important question of retroactivity; in trover and conversion the plaintiff seeks to recover the value of the articles converted as of the time of taking; if a plaintiff is successful on this theory and recovers such value as of the time of taking, together with interest, it would appear to preclude the question of damages for the alleged unconstitutionality of the taking (except for possible punitive damages) and obviously involves the choice to seek the value of the property rather than to enjcin or restrain the alleged unconstitutional taking and restore possession pending a hearing on the merits. Granting of certiorari in this case, and deciding one way or the other as to the retroactive application of the *Fuentes-Mitchell* doctrine, would furnish scant guidelines for lawyers over the country on this important question due to the plethora of distinguishing and peculiar characteristics involved in the case and the unique manner in which

the constitutional question has been raised. In short, resolution of this important question should await a more appropriate vehicle.

Respectfully submitted,

JOHN L. HEARNE
KEYES & HEARNE
304 East High Street
Jefferson City, Missouri 65101
314-635-4146
Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

vs.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

In it's Brief in Opposition to Petition for Writ of Certiorari, the Respondent asserts seven additional questions which Respondent says are presented for review. (Resp. brf. pp. 1, 2). All seven additional questions are directed at Petitioner's attack upon the constitutionality of a pre-judgment seizure under the Missouri attachment statutes and the Missouri replevin statutes, including the rules of the Supreme Court of Missouri governing procedures under the said Missouri statutes. Respondent, in the body of it's brief, pages 2 to 13 inclusive, sets forth verbatim, the pertinent Missouri statutes and rules. Since this argument of Respondent is first raised in the Brief in Opposition to Petition for Writ of Certiorari, Petitioner files this reply brief pursuant to the provisions of subsection 4 of Rule 24 of the Rules of this Court.

ARGUMENT

1. Contrary to the assertion of Respondent in it's brief, the record does clearly reflect the factual situation sufficient to support the Motion for Summary Judgment. As part of the agreements contained in Standard Pre-Trial Order Number 2, in paragraph 14 thereof it was agreed:

> "The defendant deprived the plaintiff of the possession of all the aforesaid 22 motor vehicles under Writs of Replevin, Writs of Attachment and Summons to Garnishee against the property and effects of Jimmy Swanson, d/b/a Swanson Chrysler-Plymouth, and plaintiff was not made a party to either the Replevin action or the Attachment action." (Rec. Vol. I, pg. 15)

During the trial of this case in the District Court and in open Court it was stipulated and agreed as follows:

> "Mr. Wood: If the Court please, I believe a short stipulation here that the gentlemen very kindly agree to will avoid our calling the sheriff and the circuit clerk. As I understand, they will stipulate in the record that the 22 automobiles described in the complaint were seized under writ of attachment or a writ of replevin issued in the two pending suits in Maries County against Swanson d/b/a Swanson Chrysler-Plymouth dealer, neither of which action is the plaintiff a party. Is it so stipulated?
>
> Mr. Hearne: Yes, and there is also a writ of replevin—a replevin suit in Phelps County.
>
> Mr. Wood: In Phelps?
>
> Mr. Hearne: Yes.
>
> Mr. Wood: A separate replevin suit?

Mr. Hearne: Yes.

Mr. Wood: And some of these cars——

Mr. Hearne: Were from the Rolla lot.

Mr. Wood: In other words, you are stipulating that these 22 cars were seized under writ of replevin or writ of attachment issued against Swanson in which action the plaintiff was not a party?

Mr. Hearne: That is correct."

(Rec. Vol. I, pp. 113, 114).

We respectfully submit that the foregoing stipulation and agreement in the record clearly shows that the twenty-two (22) automobiles in question were seized under writs of attachment and writs of replevin issued against Swanson and that Petitioner was not a party to either action. As indicated, Respondent has set forth at length the pertinent provision of the Missouri law on replevin and attachment.

2. At the time Petitioner filed its Motion for Summary Judgment, we believed and now believe that the question of retroactivity of the rule announced by this Court in Fuentes v. Shevin, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Crt. 1983, had been resolved by this Court in Georges v. McClellan, 409 U. S. 1120 (1973), 93 S. Ct. 935, 35 L. Ed. 2d 253, where this Court affirmed without opinion, the decision of a three Judge District Court in Rhode Island, McClellan v. Commercial Credit, 350 F. Supp. 1013 (D.R.I. 1972) affirmed sub nom. It affirmatively appears in the record in McClellan v. Commercial Credit, supra, that the Fuentes doctrine was applied retroactively in that case. That is what we argued to the District Court in support of our motion for summary judgment. We do not think there is any question of retroactivity of Fuentes doctrine remaining to be resolved by this Court in view of the McClellan case, supra.

The real question is whether or not Fuentes v. Shevin has been completely overruled by this Court in Mitchell v. W. T. Grant Co., — U.S. —, 40 L.Ed.2d 406, 94 S.Ct. . . . Mitchell v. Grant, supra involved sequestration. The case at bar involved pre-judgment seizures under replevin and attachment. The procedure followed in the case at bar does violence to the rule announced in Fuentes v. Shevin, supra. Is Fuentes v. Shevin, supra, to be completely abandoned?

The case of Higley Hill, Inc., et al., plaintiffs v. Alfred C. Knight, et al., defendants, 360 F. Supp. . . . (D. Mass. 1973) (Resp. brf. p. 27), lends no support to the position of Respondent that the case is authority in the case at bar, in that the Fuentes rule is not retroactive or retroactive in this case. In the Higley Hill case, supra, the Court did hold a hearing before the writ was issued. In the case at bar there was a pre-judgment seizure of the automobiles involved. No hearing was ever held. Moreover, the case above indicates this Court, in affirming the decision of the three Judge District Court in Georges v. McClellan, supra, has definitely applied the Fuentes doctrine retroactively.

Contrary to the assertion of the Respondent in his brief on page 21, the constitutionality of the original taking was raised by Petitioner on December 18, 1972. The trial in the District Court was held on July 7 and 8, 1971, and was continued for further evidence until May 24, 1973, so that the constitutionality of the original taking was raised by Petitioner, in its Motion for Summary Judgment and argued by the Petitioner before the final trial date on the issues.

Thus, the constitutionality of the replevin and attachment was raised before the final trial and after the Fuentes opinion was handed down, thus placing the Court on notice that the new pre-judgment replevin and attachment rules were at least suspect and they knew, or should have known that attachment

and replevin made without notice and hearing opportunity were governed by principles spelled out in Fuentes. Higley Hill, Inc., supra.

Respectfully submitted

HAROLD S. HUTCHISON
Vienna, Missouri 65582
Phone: 422-3396

CLAUDE T. WOOD
Richland, Missouri 65556
Phone: 765-4451

Attorneys for Petitioner

CERTIORARI DENIED